BMTT CORPORATION SDN BHD A

v.

CBTECH (M) SDN BHD

HIGH COURT MALAYA, SHAH ALAM B
HADHARIAH SYED ISMAIL J
[CIVIL SUIT NO: 22NCVC-795-06-2012]
17 FEBRUARY 2014

BANKING: *Letter of credit - Construction - Parties entered into contract for sale and purchase of equipment - Letter of credit required signed commercial invoices and delivery order - Defendant's failure to provide required documents to complete delivery of equipment - Terms and condition of contract - Defendant's refusal to check equipment and to provide required documents - Whether justified - Whether contract breached* C D

CONTRACT: *Frustration - Change in circumstances - Parties entered into contract for sale and purchase of equipment - Defendant's failure to provide required documents to complete delivery of equipment - Allegation that defendant's client had changed system - Whether contract frustrated* E

The plaintiff had provided the defendant with a quotation of sale for the Argonite Fire Extinguishing System ('the equipment') which included a term that payment must be made by way of an irrevocable letter of credit. Having accepted the plaintiff's F quotation, the parties entered into a contract for the sale and purchase of the equipment. The plaintiff then received a letter of credit by OCBC Bank which required the provision of three signed commercial invoices and a delivery order made out in duplicate to OCBC Bank countersigned by the defendant's authorised G signatories ('the required documents'). This requirement was communicated to the defendant. However, on 1 September 2010, when the equipment was brought to the defendant's site, the defendant failed/refused and/or neglected to provide the plaintiff with the required documents. Despite this, the plaintiff informed H the defendant on 13 September 2010 that it was still willing to deliver the equipment and further reminded the latter that the letter of credit would expire on 18 September 2010. The defendant wrote to the plaintiff stating that it was unaware of the required documents. The plaintiff then demanded the defendant to I

prepare the required documents and honour the terms of the contract but the defendant refused to do so. Thus, in the present claim, the plaintiff sought for the sum of RM1,206,025 being the contract price or alternatively, for damages to be assessed for breach of contract arising from the sale of the equipment which the defendant argued they could not accept as their client, Tenaga Nasional Berhad ('TNB'), had changed the Argonite System to a new system and hence, the contract was frustrated. The issues that arose for consideration were: (i) whether providing the alleged required documents for the letter of credit at the delivery site and upon delivery of the said equipment was a term and condition of the contract; (ii) whether the defendant was wrong when it refused to check the equipment and then refused to give the signed delivery orders required by the defendant's own letter of credit; (iii) whether the contract had been frustrated; and (iv) whether the plaintiff was entitled to claim RM1,206,025.

Held (allowing plaintiff's claim with costs):

(1) It is a norm that when goods are delivered, the buyer would check and verify the goods before acknowledging receipt of the goods by signing the delivery order on the date of delivery itself. The plaintiff was right in insisting for the signed delivery order because they had sent the delivery order prior to 1 September 2010. The defendant's argument that the goods must be left at their site and the delivery orders would be signed later at their convenience was absurd. The plaintiff's representatives and the equipment were at the defendant's site for three hours from 2pm to 5pm. The defendant had ample time to check, verify and sign the delivery order, which was a one page document and would take split seconds for the defendant's directors to sign. (para 17)

(2) The defendant's reasoning was fallacious and its plea of frustration was a non-starter. A contract is not frustrated when one party to the contract changes its mind after the other party to the contract had performed its obligations. It was not impossible for the plaintiff to deliver the equipment ordered by the defendant because the plaintiff was ready and willing to deliver. It was also not impossible for the defendant to accept and pay for the equipment because TNB had approved the Argonite System. It was the defendant who

instigated TNB to change to another system. The defendant's application to TNB to change the system was made after the delivery date. Therefore, it was a case where the defendant had changed its mind and not TNB. Further, it was not a term of the contract that the system was subject to TNB's approval as the deal was between the plaintiff and the defendant only. (paras 17, 18, 20, 24 & 25)

(3) There was a wilful breach of contract by the defendant. The defendant's breach went to the root of the entire contract. The plaintiff had proved that they were the innocent party entitled to be paid the contract price. The plaintiff had specially tailor-made the equipment for the defendant's project and they were ready and willing to deliver the equipment worth RM1,206,025 to the defendant. In fact, the plaintiff had acted in a gentleman manner when they said that despite whatever that had happened, they were ready and willing to send the equipment provided the defendant gave the signed delivery orders. The defendant had refused to do so and did not show any commitment to fulfil their obligation. (paras 20, 24 & 25)

Case(s) referred to:

Davis Contractors Ltd v. Fareham UDC [1956] AC 696 ***(refd)***

Industrial & Agricultural Distribution Sdn Bhd v. Golden Sands Construction Sdn Bhd [1993] 1 LNS 96 HC ***(refd)***

Letrik Bandar Hup Heng Sdn Bhd v. Wong Sai Hong [2002] 5 CLJ 170 HC ***(refd)***

Pacific Forest Industries Sdn Bhd & Anor v. Lin Wen-Chih & Anor [2009] 6 CLJ 430 FC ***(refd)***

Popular Industries Ltd v. The Eastern Garment Manufacturing Co Sdn Bhd [1990] 1 CLJ 133; [1990] 2 CLJ (Rep) 635 HC ***(refd)***

Other source(s) referred to:

Visu Sinnadurai, *Law of Contract in Malaysia and Singapore: Cases and Commentary*, 2nd edn, 1987, p 519

For the plaintiff - Yudistra Darma Dorai (Noorima Fairuz with him); M/s Raj, Ong & Yudistra

For the defendant - Yip (JR Ng with him); M/s Yip & Co

Reported by Najib Tamby

JUDGMENT

Hadhariah Syed Ismail J:

Introduction

[1] The plaintiff's claims against the defendant is for the sum of RM1,206,025 being the contract price or alternatively for damages to be assessed for breach of contract arising from the sale of Argonite Fire Extinguishing System (hereinafter referred to as the Argonite System) which the defendant say they cannot accept as their client had changed the Argonite System to a new system and the contract is frustrated.

Facts

[2] The plaintiff in its statement of claim avers that on 28 January 2010, the plaintiff provided the defendant with a quotation for sale of the Argonite System (the equipment) for the sum of RM1,206,025. Some of the equipment was specially obtained by the plaintiff based on the specialised specifications of the defendant's requirement. The quotation included a term that payment should be by way of an irrevocable letter of credit. *Vide* a purchase order dated 10 February 2010, which was faxed to the plaintiff on 23 February 2010, the defendant accepted the quotation and placed an order for the purchase of the equipment. Thus, the plaintiff and the defendant had entered into a contract for the sale and purchase of the equipment. The plaintiff then received an OCBC Bank letter of credit dated 19 August 2010. The letter of credit required, *inter alia*, three signed commercial invoices and a delivery order made out in duplicate to OCBC Bank countersigned by the defendant's authorised signatories (the required documents). The plaintiff wrote to the defendant, drawing its attention to the required documents and also asking the defendant to inform the plaintiff pertaining to the delivery date for the plaintiff to deliver the equipment. The plaintiff was informed by the defendant that the equipment was to be delivered on 1 September 2010 at 3pm; and informed that the director of the defendant will be at the defendant's site to provide the required documents and to append the necessary signatures. On 1 September 2010 at about 2pm, the plaintiff brought the equipment to the defendant at the defendant's site and was at all

times ready and prepared to unload the equipment. However, the defendant has failed/refused and/or neglected to provide the plaintiff with the required documents. On 13 September 2010, the plaintiff wrote to the defendant that the plaintiff was ready and willing to deliver the equipment despite the occurrence on 1 September 2010. The plaintiff further reminded the defendant that the letter of credit expires on 18 September 2010. On 15 September 2010, the defendant wrote to the plaintiff stating that the defendant was unaware of the required documents. This was despite the fact that the plaintiff had reminded the defendant of this *vide* its earlier letters. Thus, the plaintiff alleged the defendant has breached the contract by neglecting and/or failing to prepare the required documents and failed to honour the contract. On 4 October 2010, the plaintiff *via* its solicitors, wrote to the defendant, demanding for the defendant to prepare the required documents and honour the terms of the contract. The defendant refused to honour its obligation under the contract. As a result of the defendant's breach, the plaintiff has suffered losses and damage ie, RM1,206,025 being the contract price or alternatively for damages to be assessed.

The Issues

[3] The primary issues before the court are:

(a) Whether providing the alleged required documents for the letter of credit at the delivery site and upon delivery of the said equipment is a term and condition of the contract of sale between the plaintiff and the defendant?

(b) Was the defendant wrong when it refused to check the equipment and then refused to give the signed delivery orders required by the defendant's own letter of credit?

(c) Whether the contract has been frustrated due to unforeseen circumstances?

(d) Whether the plaintiff is entitled to claim RM1,206,025?

The Evidence

[4] The plaintiff's case rest solely on the evidence of its Executive Director, Mr Tan Chin Heng (PW1). To begin with, PW1 said the plaintiff are specialised supplier of the Argonite

system and that the equipment is specialised. This fact is admitted by the defendant's director, DW2. He went on to explain why the equipment ordered by the defendant is specialised as follows:

(a) When the defendant first approached the plaintiff, they had to discuss with the defendant the layout and architectural drawings. Then the plaintiff will design a system according to the defendant's specification. This is to ensure the Argonite equipment is able to extinguish any fire in the room.

(b) The equipment was specially ordered from the main supplier called Kiddie in Denmark for the defendant's project only and cannot be used elsewhere.

[5] He also told the court the defendant purchased the Argonite system for its Starpuri Development at Jalan Ceylon, Kuala Lumpur (the project). The end user of the equipment is Tenaga Nasional Berhad (TNB). It is an undisputed fact that the contract price of RM1,206,025 is for the supply and installation of the equipment for three Towers ie Tower A, Tower B and Tower C of the said project. It is also not disputed that delivery of the equipment is done in instalment, depending on whether the site is ready to receive them. With regard to payment, he said when the plaintiff received the bank's letter on 19 August 2010, they immediately rang up the defendant on or about 25 August 2010, reminding them about the documents required in the letter of credit. In response thereto, the defendant requested the plaintiff to prepare the delivery order. Hence, the plaintiff prepared the draft delivery order and delivered it by hand to the defendant on 25 August 2010. What is meant by "draft delivery order" is the delivery order is not signed by the defendant. To prove this, the plaintiff produced a transmitted copy of delivery order being sent to the defendant. This document can be found at p. 40 of Bundle C. He said this was done to assist the defendant to get the necessary completed delivery orders on the day of delivery. The defendant's witness, DW2 say he did not receive the delivery order. But he agrees there is proof the delivery order was sent to the defendant on 25 August 2010 *via* p. 40 Bundle C. DW3 said he cannot recall whether a delivery order was sent to the defendant prior to 1 September 2010. Essentially, the defendant's witnesses did not deny delivery order was sent to the defendant prior to 1 September 2010. They merely say they did not personally received it. Thus, I find PW1's testimony that the

plaintiff has sent the delivery order to the defendant prior to 1 September 2010 is supported by a contemporaneous document. He is telling the truth. I accept his evidence on this issue.

[6] What happen next is this. Pursuant to the terms of the quotation, the defendant issued to the plaintiff a letter of credit for the sum of RM128,073.48 for Argonite System for Tower A and instructed the plaintiff to deliver the equipment at the defendant site on 1 September 2010. In order for OCBC Bank Berhad to make payment on the letter of credit for the equipment, the plaintiff must produce the following documents to the bank:

(a) Three copies of invoices; and

(b) Two copies of delivery orders countersigned by the defendant.

[7] It is not disputed that the plaintiff must obtain the signatures of the defendant's two authorised signatories namely Khoo Kheng Kiat (DW2) and Eric Yong on the delivery orders. This is when the dispute begin.

[8] Moving on to the incident on 1 September 2010, PW1 admitted he was not present at the defendant's site on that day to deliver the equipment. Nevertheless he said he was aware of what had transpired. This is what he alleged to have happened. The equipment arrived at the defendant's site on 1 September 2010 at about 2 o'clock in the afternoon. But the documents required by OCBC Bank ie the invoices and delivery orders duly signed by the defendant's directors were not available in exchange of the equipment. The plaintiff's worker waited until 5 o'clock for the required documents, but in vain. So, the plaintiff took the equipment back to their warehouse in Subang Jaya. PW1 stress the point that on that day, the plaintiff was ready to unload but not willing to part with possession. PW1 was asked why the plaintiff did not simply hand over the equipment to the defendant. His reply was the plaintiff could not hand over the equipment without there being a guarantee for payment. In a spirit to resolve the problem, he met with Mr Khoo Kheng Kiat (DW2) and KM Lee, both from the defendant's company on 7 September 2010 to iron things out. Parties failed to come to a settlement. The dispute persisted. Despite that, the plaintiff informed the defendant that they (plaintiff) were ready and willing to deliver the equipment and asked the defendant to provide a date for delivery. Unfortunately,

on 9 September 2010, the defendant wrote to the plaintiff, not that they request for delivery; but the defendant stated the Argonite system is subject to their consultant's acceptance. The defendant's consultant is Norman Disney and Young. In PW1's own words, such a condition was not mentioned in the quotation. At that point of time, PW1 said he realised the defendant had changed its mind and wish to renege the contract. He then instructed his lawyer to write to the defendant, which his lawyer did so on 4 October 2010, stating that the plaintiff was still ready and willing to deliver the equipment. But, the defendant's own lawyers wrote back to say the defendant no longer wanted the equipment. As a result of the defendant's breach, the plaintiff claimed they have suffered losses of RM1,206,025. This sum include the profit which the plaintiff would have got had the defendant honoured the contract. Hence, this action is instituted to recover their losses.

[9] In cross-examining PW1, the defendant sought to establish that the quotation does not say delivery of the equipment must be in exchange of the required documents, to which PW1 agree. But he disagree that the plaintiff has imposed a new term to the quotation in insisting the defendant to provide the signed delivery orders before handing over of the equipment could be done.

[10] Moving on to the defendant's case. The defendant called four witnesses. The defendant's director, Khoo Kheng Kiat (DW2) who was at the defendant's site on 1 September 2010 told the court that he refused to sign the invoices and delivery order on that day as his staff needed time to check and verify whether the equipment accord the purchase order. He said the commercial practice is for the supplier to deliver the goods first and then to send the invoices and delivery order to the buyer later. When asked by his counsel whether he would have signed the delivery order on 1 September 2010, DW2 said if the equipments were unloaded on that day and after checking and verifying everything was in order, he would have signed the invoices and the delivery order on 1 September 2010. He further said his other director, Eric Yong would also sign once he had signed. I find this answer contradict his earlier answer. The defendant must elect which of the two statement is correct; the delivery order to be sent and signed later or could be signed on delivery date provided the goods is unloaded and checking is done? If the latter is the true

position, then why didn't DW2 tell the plaintiff's worker on 1 September 2010 to unload the equipment for them to check and the defendant will sign the delivery order? After all, PW1 say the checking only take roughly about half an hour. Instead the defendant say they are not aware of the required documents and the plaintiff's demand is against the commercial practice. The conduct of the defendant on 1 September 2010 goes to show the defendant had evinced an intention not to honour the contract.

[11] During cross-examination, DW2 admitted to the following facts:

(a) There was no way the signed delivery orders could be given on 1 September 2010 because the other authorised signatory, one Eric Yong was not available on the day.

(b) That the delivery order was delivered and received by the defendant one week prior to delivery on 1 September 2010.

(c) That in the defendant's letter dated 9 September 2010 to the plaintiff, the defendant never told the plaintiff "please deliver the goods and we will sign the delivery orders".

[12] DW2 further agree the defendant offers three different contradicting reasons for refusing to provide the properly signed delivery orders on 1 September 2010. They are:

(i) That, it wasn't a condition for the delivery orders to be properly signed and given to the plaintiff on 1 September 2010.

(ii) That the plaintiff had insisted on a director being present at the site during delivery.

(iii) That the plaintiff should leave the equipment with the defendant on 1 September 2010. Then, separately, it should send the delivery order to the defendant's office. Then, the defendant, in its own time, would have its signatories sign them and return the same to the plaintiff.

[13] However, at the trial DW2 agreed the plaintiff is not interested in his presence at site and that reason listed as number (ii) above is not true. When pressed by counsel for the plaintiff, which of the three reasons is correct, DW2 said the plaintiff wants a pre-signed delivery orders. DW3 gave essentially the same

evidence as DW2. With regard to frustration, DW2 said, TNB has instructed the defendant to change Argonite system to FM200.

[14] I now consider the issue. I find the first and second issues are inter-related ie, whether handing over of the equipment and the signing of the delivery order at site is a concurrent event?

[15] Mr Yip, counsel for the defendant submits it was the plaintiff who had breached the contract and not the defendant. He argued the plaintiff breached the contract in insisting the defendant to sign the delivery order before the equipment could be unloaded and handed over to the defendant when there is no term to that effect in the quotation. He also argued it is impossible for the defendant to sign the delivery order because the plaintiff did not give the delivery order to the defendant on or before 1 September 2010 to be signed. Mr Yip further argued the delivery order is to be signed after the equipment is handed over to the defendant on the following grounds:

(a) The Letter of Credit provides:

> The said delivery order must be countersigned by the applicant's authorized signatory (ies) whose signature (s) are to be verified by the issuing bank. Certifying receipt of the merchandise in good order and condition.

(b) Plaintiff had to complete the entire contract for Tower A, Tower B and Tower C before they can collect payment.

(c) The letter of credit is irrevocable.

(d) There is no basis for the plaintiff to fear they will not get the payment because the quotation provides:

> A purchase order/an agreement for the quoted amount is equired to proceed with the works. All materials stipulated shall remain exclusively BMTT Corporation Sdn Bhd until the full and final amount has been settled.

[16] On the other hand, Mr Yudistra Darma, counsel for the plaintiff submits what the plaintiff require for the delivery to be completed are the documents required by OCBC Bank. Without the signed delivery order, the plaintiff cannot present the letter of credit for payment. He further argued the term "60 days validity" stated in the quotation and in the letter of credit refers to the

time period which BMTT Corporation has to present the letter of credit to the bank. Coming back to the defendant's contention that it wasn't a condition for the delivery orders to be properly signed and given to BMTT Corporation on 1 September 2010, Mr Yudistra Darma submits the defendant's contention is ridiculous because the condition of the delivery orders being signed by the authorised signatories was imposed by the defendant's agent and not the plaintiff. I agree with the plaintiff on this point. Of course the words "signed delivery orders to be ready on delivery date in exchange of goods" was not mentioned in the quotation. Neither was there the words "delivery orders will be signed after the goods is hand over and verification done" mentioned in the quotation. The argument put forth by the parties thus far relates to the timing; whether delivery orders to be signed on the date of delivery or later. When the quotation is silent and there is no credit term, the Sale of Goods Act 1957 applies.

Section 32 of the Sale of Goods Act 1957 reads:

32. Payment and delivery are concurrent conditions

> Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions, that is to say, the seller shall be ready and willing to give possession of the goods to the buyer in exchange for the price, and the buyer shall be ready and willing to pay the price in exchange for possession of the goods.

[17] It is a norm when goods are delivered, instantly the buyer will check and verify the goods before he or she acknowledged receipt of the goods by signing the delivery order on the date of delivery itself. I don't think different practice applies when one purchase a car or an equipment. I, therefore find the defendant's argument that the goods must be left at their site and the delivery orders will be signed later at their convenience is absurd. No right thinking seller, in similar circumstances would do that. The plaintiff was right in insisting for the signed delivery order because they have sent the delivery order one week prior to 1 September 2010. The defendant has ample time to sign the delivery order. I believe the delivery order, probably is a one page document. It took split seconds for the defendant's directors to sign. PW1's unrebutted evidence is verification can be done with within half an hour. In this case, the plaintiff's representative and the equipment was at the defendant's site from 2pm to 5pm. They waited for three

hours, more than sufficient time for the defendant to check and verify. But, the defendant never informed the plaintiff on 1 September 2010 that they want to check and verify the equipment and will sign the delivery orders. The defendant simply did not show any commitment to fulfil their obligation. This is evident when the defendant later told the plaintiff they no longer want the equipment.

[18] On the facts and circumstances of this case, I find the defendant is the party who had breached the contract of sale when:

(a) They refused to provide the signed delivery orders on 1 September 2010.

(b) They unilaterally imposed a new term in the quotation in stating the Argonite system is subject to their consultant's acceptance. This condition was imposed after the delivery date.

(c) They do not want the equipment.

[19] I'd say the defendant had acted unreasonably in their dealing with the plaintiff. Just see the various reasons given by the defendant why they refused to provide the signed delivery orders on 1 September 2010. The reasons are:

(a) They are not aware of the required documents.

(b) The plaintiff requested for pre-signed delivery orders.

(c) It is against commercial practice.

(d) They need to get approval from their own consultant before they can accept the equipment.

[20] I reject all the grounds put forth by the defendant because the defendant simply have no valid grounds not to sign the delivery order. To the contrary, I find the plaintiff have acted in a gentleman manner when they say despite whatever has happened, they are ready and willing to send the equipment provided the defendant give the signed delivery orders. It was the defendant who refused. Thus, I hold there is a wilful breach of contract by the defendant.

Whether The Contract Has Been Frustrated?

[21] The defendant pleads an alternative defence of frustration. This is what is pleaded in paras. 12 and 13 of the defence:

> 12. Lanjutan itu dan/atau sebagai alternatif, defendan akan menyatakan bahawa sekiranya terdapat suatu kontrek yang mengikat plaintif dan defendan yang mana mempertanggungjawabkan defendan untuk menerima bahan-bahan tersebut, kontrek tersebut telah pun kini dikecewakan oleh sebab perkara-perkara di luar kawalan defendan.
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> 13. Defendan juga menyatakan bahawa menurut suatu surat bertarikh 20.9.2010, Tenaga Nasional Berhad telah memaklumkan Tetuan Norman Disney and Young Sdn Bhd iaitu konsultan projek tersebut bahawa sistem pencegahan api terpakai yang diluluskan oleh Tenaga Nasional Berhad telah pun ditukar.

[22] It is the defendant's case that their client for its project ie, Tenaga Nasional Berhad (TNB) subsequently changed the requirement of the fire fighting system from Argonite to FM200. Because of this, the contract is frustrated. In their testimony, the defendant's witnesses said if the defendant proceeded to accept and installed the equipment they ordered from the plaintiff, there is a risk TNB will reject it and the defendant may not get the payment. Thus, they cannot accept the equipment. That is their understanding of frustration. Mr Yudistra Darma for the plaintiff submits there are two things wrong with this defence. They are:

(a) Even if TNB did change the approval, it is not frustration as defined in law; and

(b) TNB never disapproved the Argonite system. It merely allow the defendant's own application to change it to a different system.

[23] In law, frustration is stated to arise in the following circumstances:

(i) A contract is frustrated when subsequent to its formation, a change of circumstances renders the contract legally or physically impossible to be performed (Visu Sinnadurai, *Law of Contract in Malaysia and Singapore: Cases and Commentary*, 2nd edn. (1987), p. 519).

(ii) Without the default of either party, a contractual obligation becomes incapable of being performed as the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract; see *Davis Contractors Ltd v. Fareham UDC* [1956] AC 696 (HL).

(iii) A contract does not become frustrated merely because it becomes difficult to perform; see *Pacific Forest Industries Sdn Bhd & Anor v. Lin Wen Chih & Anor* [2009] 6 CLJ 430 at p. 439.

[24] In other words, the kind of frustration the law recognised is where the contractual obligations become impossible to be performed. In the case before me, the defendant sought to be discharged from its obligations to accept the equipment. I find the defendant's reasoning is fallacious. The defendant has not been truthful in raising frustration if the sequence of event is looked into. I will summarise them below:

(a) The quotation was sent on 28 January 2010 and accepted by the defendant on 23 February 2010.

(b) The quotation, the purchase order and the letter of credit make no mention of any approval by any third party.

(c) As at 1 September 2010, the date of delivery, TNB had no issue with Argonite system being used. There is no dispute of this facts.

(d) Prior to the dispute arising on 1 September 2010, the defendant made no mention that the equipment required TNB's approval. This is undisputed.

(e) The defendant's own witness, their consultant engineer from M/s Noeman, Disney & Young (DW4) said that as at 12 August 2010, Argonite was still approved.

(f) It was the defendant who instigated TNB to change the Argonite system to a new system. This is apparent from TNB's letter dated 21 March 2011 to the main contractor of the project, Crest Builder Sdn Bhd. The defendant is the subsidiary of Crest Builder Sdn Bhd. Para 2 and 3 of the said letter reads:

2. Adalah dimaklumkan permohonan pihak tuan untuk menukar sistem Argonite yang telah diluluskan oleh jabatan ini kepada sistem FM200 tidak dapat dipertimbangkan.

3. Kelulusan terdahulu dengan perakuan Jurutera Perunding Norman Disney & Young masih sah dan boleh digunapakai.

The existence of this letter is not denied by the defendant.

g. The change of the system by TNB takes place after the purchase order was issued and after the delivery date. The defendant admitted that the plaintiff was not at fault for a TNB's change of approval.

[25] From the above facts, I agree with the plaintiff that TNB had approved the Argonite system. It was the defendant who instigated TNB to change the Argonite system to FM200. It is also a proven fact that the defendant application to TNB to change the system was made after the delivery date. So, it is a case of the defendant who change its mind, not TNB. My view is, a contract is not frustrated when one party to the contract change its mind after the other party to the contract had performed its obligations. The test of frustration here is, is it impossible for the plaintiff to deliver the equipment ordered by the defendant. The answer is "not impossible" because the plaintiff is ready and willing to deliver. The next question is, is it impossible for the defendant to accept and pay for the equipment? Again, the answer is "not impossible" because TNB had already approved Argonite system. Further, it was not a term of the contract that the system is subject to TNB's approval. The deal is between the plaintiff and the defendant only. Even if TNB change the system to FM200, the defendant's remedy is against TNB. Really, the problem of "we cannot accept" or "impossibility" is self created by the defendant and not from circumstances beyond the control of the defendant. On the facts and circumstances mentioned above, I agree with the plaintiff's submission that the defendant's plea of frustration is a non-starter.

Losses And Mitigation

[26] It is an established facts that the equipment for this contract contained various parts which made up a specialised, customised or tailor-made Argonite system for the defendant's project. The plaintiff's operation director, Tan Chin Heng (PW1) testified that

apart from the gas cylinders, all the other equipment was specially ordered for this project. This fact is admitted by the defendant's witness. Mr Yip for the defendant submits the plaintiff failed to prove they have suffered losses of RM1,206,025. In particular, he said the plaintiff is not entitled to claim for Tower B and Tower C. He further submits the plaintiff failed to prove they are entitled to be paid the sum of RM1,206,025. He refers the court to the following cases:

(a) *Letrik Bandar Hup Heng Sdn Bhd v. Wong Sai Hong* [2002] 5 CLJ 170; [2002] 5 MLJ 247.

(b) *Industrial & Agricultural Distribution Sdn Bhd v. Golden Sands Construction Sdn Bhd* [1993] 1 LNS 96; [1993] 3 MLJ 433.

(c) *Popular Industries Ltd v. The Eastern Garment Manufacturing Co Sdn Bhd* [1990] 1 CLJ 133; [1990] 2 CLJ (Rep) 635; [1989] 3 MLJ 360.

[27] I reject the defendant's submission. Whilst it is true that any person claiming for damages must prove their losses, in this case the plaintiff is suing for the contract price. I accept PW1 testimony that the plaintiff have specially tailor-made the equipment for the defendant's project only and they are ready and willing to deliver the equipment worth RM1,206,025 to the defendant. I also accept PW1's evidence that RM1,206,025 includes profit the plaintiff would have gained had the defendant honoured the contract. I, therefore reject Mr Yip's contention that the plaintiff is not entitled to claim for Tower B and Tower C because the contract price is for all three Towers. The defendant's breach goes to the root of the entire contract. The only issue left to be considered is whether the plaintiff had mitigated their losses. PW1 told the court the plaintiff attempted to sell the gas cylinders (the other equipment was unique to the defendant's project and could not be sold) to 18 other potential buyers. To prove this, he produced the various quotations marked as exh. P13. But there was no taker. I accept PW1's evidence. In the circumstances, I hold the plaintiff had taken a reasonable steps to mitigate their losses. But, they could not get the buyer. Thus, the plaintiff has proven that they are entitled to claim RM1,206,025.

[28] In conclusion, I would say this is a straight forward case of wilful breach of contract by the defendant. The plaintiff has proved they are the innocent party who are entitled to be paid the contract price had the contract not being broken. I, therefore allow the plaintiff's claim for the sum of RM1,206,025 with interest of 5% thereon calculated from the date of judgment till satisfaction and RM30,000 cost.

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